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No. 01-1572

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES *EX REL.* JANET CHANDLER, PH.D.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether local governmental entities are subject to *qui tam* actions under the False Claims Act.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have an obvious and vital interest

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and their letters of consent have been

in judicial decisions affecting the exposure of local governmental entities to penal sanctions such as those imposed under the False Claims Act.

Local governmental entities have traditionally been immune from suits seeking punitive damages. Nonetheless, they have increasingly been named by *qui tam* relators as defendants in False Claims Act suits. Unless it is reversed, the Seventh Circuit's determination that local governmental entities are subject to FCA *qui tam* actions will throw open the floodgates to a tidal wave of *qui tam* litigation against such defendants.

The effect of subjecting cities, counties, towns, and villages to FCA *qui tam* liability cannot be overstated. Merely having to defend against such lawsuits will strain the limited budgets of these entities. To avoid the risk of the massive penalties that can be imposed under the FCA, moreover, these entities (like the private entities subject to the FCA) may be forced to pay significant sums to settle all but the most frivolous of these cases. These unprecedented expenditures may well interfere with the ability of local governments to perform their essential functions and provide services to their citizens. Indeed, a significant FCA judgment could bankrupt a county, town, or other small municipality. In addition, the prospect of FCA liability may make some municipalities reluctant to participate in federal programs.

Because of the importance of the question presented to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

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filed with the Clerk. Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici*, their members or counsel has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Local governmental entities have been immune from punitive damages at common law for over 150 years. In its decision in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court reaffirmed the strong presumption that local governmental entities are immune from punitive awards imposed under federal law. The Court explained that neither the retributive nor the deterrence rationale of punitive damages was furthered by punishing governmental entities. Instead, such awards operate only to punish the innocent citizens of a municipality for the actions of others, threatening increased taxes, reduced services, and bankruptcy of the municipality itself.

Because of the longstanding common law tradition of municipal immunity from punitive damages, this Court presumes that Congress understands and respects that immunity when it enacts federal law. As a result, this Court will interpret federal statutes to retain the common law immunity from punitive liability unless the statute clearly and expressly provides to the contrary.

The False Claims Act contains no specific provision that could possibly operate to deprive local governmental entities of their immunity from punitive damages. The original enactment of the FCA in 1863 provided no clear statement that municipalities were "persons" subject to the Act. The Seventh Circuit's assumption that municipalities were presumptively considered "persons" in 1863 results from its misreading of this Court's precedent.

The 1986 amendments to the FCA radically transformed the statute, essentially creating a new cause of action. The increased civil penalties and treble damages available following the amendments converted the previous remedial damages scheme into a punitive regime. The amendments also vastly increased the financial incentives for private *qui*

tam relators to file suit, which has predictably given rise to a flood of FCA litigation since 1986. Unlike the Federal Government, moreover, private relators do not exercise prosecutorial discretion in determining whether to threaten municipalities with punitive liability under the FCA. It would take an exceptionally clear statement to demonstrate that Congress intended to subject local governments to this new, untethered punitive liability.

The 1986 amendments contain no such clear statement. This Court's analysis in *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), demonstrates that the 1986 FCA amendments did not evince any intent by Congress to displace the traditional governmental immunity from punitive damages. Tellingly, the court below did not purport to find such a clear statement in the FCA. Rather, the court inverted the correct approach, incorrectly presuming that municipalities were "persons" in 1863 and requiring Cook County to find a clear statement that it was immune from the FCA. Under the proper analysis, employed by this Court in both *City of Newport* and *Stevens*, governmental entities are presumed to be immune from the FCA's punitive damage scheme absent a clear statement in the FCA that abrogates municipal immunity. No such clear statement exists, and the judgment below accordingly must be reversed.

ARGUMENT

I. CONGRESS MUST CLEARLY STATE ITS INTENTION TO ABROGATE LOCAL GOVERNMENTAL ENTITIES' LONGSTANDING IMMUNITY FROM PUNITIVE DAMAGES

A. Local Governmental Entities Have Long Enjoyed Common Law Immunity From Punitive Damages

Since the mid-nineteenth century, "the immunity of a municipal corporation from punitive damages at common law [has] not [been] open to serious question." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981). As this Court explained in *City of Newport*, "[l]ocal units of government initially were shielded from tort liability by the doctrine of sovereign immunity." *Id.* at 259 n.19. Although courts later declined to extend absolute sovereign immunity to local governments, they "viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised." *Id.* at 263.[2] Accordingly, "[t]he general rule today is that no punitive damages are allowed unless expressly authorized by statute." *Id.* at 261 n.21. See also *Barnes* v. *Gorman*, 122 S.Ct. 2097, 2103 (2002) (Stevens, J., concurring in the judgment).

In *City of Newport*, the Court reviewed in detail the reasons why "[d]amages awarded for *punitive* purposes * * * are not

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[2] See, *e.g.*, *Foss* v. *Maine Turnpike Auth.*, 309 A.2d 339, 345-346 (Me. 1973) ("the deterrent function of exemplary damages is wholly negated" if applied against innocent taxpayers); *Fisher* v. *City of Miami*, 160 So. 2d 57, 60 (Fla. Ct. App. 1964) (permitting punitive damages would "penalize[] the public in order to accomplish nothing" because public cannot control wrongdoers); *Town of Newton* v. *Wilson*, 91 So. 419, 419-420 (Miss. 1922) (subjecting taxpayers to "punishment for the willful and malicious acts of its servants would be to contravene sound public policy").

sensibly assessed against the governmental entity itself." *Id.* at 267. The Court recognized that "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *Id.* at 266-267. As the Court explained, neither the retributive nor the deterrence rationale of punitive damages is furthered when those damages are imposed upon local governmental entities.

"Regarding retribution," the Court observed "that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort." *City of Newport*, 453 U.S. at 267. Punitive damages are "likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *Ibid.* These costs are borne disproportionately by the "widows, orphans, aged men and women, and strangers" who depend upon the services provided by the municipality. *Id.* at 261 (quoting *McGrary* v. *President & Council of the City of Lafayette*, 12 Rob. 668, 677 (La. 1846)). Thus, the Court declared, "punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff" that is paid by persons who had no part in the wrongful conduct. *Id.* at 267. "Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *Ibid.*

The Court also concluded that the award of punitive damages against local governments could not be justified on a deterrence rationale. First, the Court found it unlikely that local government officials "would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality." *City of Newport*, 453 U.S. at 268. As a result, "the impact on the individual tortfeasor of this deterrence in the air is at best uncertain." *Id.* at 269.

Second, to the extent that individual officials were susceptible to deterrence by actions against the municipality, the Court found no reason to believe that they could be deterred only by penalties such as punitive damages. "The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity." *Id.* at 269 (quoting *Carlson* v. *Green*, 446 U.S. 14, 21 (1980)).

Third, the Court found that the deterrent effect of punitive damages would not operate any more effectively on "the electorate at large." *Id.* at 269. Even if such deterrence were necessary or desirable, moreover, the Court concluded that compensatory damages were likely sufficient to provide that deterrence. See *ibid.* ("if additional protection is needed, the compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office").

Finally, the Court observed that "there is available a more effective means of deterrence" than imposing punitive awards on municipalities. *City of Newport*, 453 U.S. at 269. Deterrence could be better obtained "[b]y allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources." *Ibid.* In sum, the Court concluded that punitive damages would have their intended effect only if they punished the wrongdoer, rather than the municipality for which the wrongdoer worked.

While concluding that there is no public benefit to imposing punitive damages on local governmental entities, the Court emphasized that "the costs [of doing so] may be very real." *Id.* at 270. Because the perceived "unlimited taxing power" of a municipality makes it a deep pocket that is a natural target for punitive damages suits, allowing punitive damages against municipalities "may create a serious risk to the financial integrity of these governmental entities." *Ibid.*

Given "the possible strain on local treasuries and therefore on services available to the public at large," the Court deemed it "unwise to inflict the risk." *Id.* at 271.

B. Congress Must Clearly State Its Intention To Abrogate This Immunity By Statute

In *City of Newport*, this Court ruled that Congress did not intend to subject local governmental entities to punitive damages under the Civil Rights Act of 1871. That decision establishes the proper framework for determining whether Congress intended to abrogate such entities' traditional immunity from punitive damages when it enacted other statutes, such as the FCA.

The Court posited that when it enacted the Civil Rights Act, Congress was "familiar with common-law principles," including immunities, and "intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport*, 453 U.S. at 258. In particular, by 1871, the tradition of municipal immunity from punitive damages was sufficiently strong that the Court presumed that "Congress would have specifically so provided had it wished to abolish the doctrine." *Id.* at 263 (quoting *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967)). Accordingly, although municipalities plainly were subject to *compensatory* liability under the Civil Rights Act, the Court concluded that they could not be held liable for punitive damages under that statute.

Since *City of Newport*, the presumption against punitive liability has been the starting point for any analysis of whether local governmental entities are subject to punitive damages under a particular statute. Absent "*specific provisions* to the contrary," this Court will conclude that Congress intended for local governmental entities to retain their traditional immunity from punitive damages. *Id.* at 258 (emphasis added); see also *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 67 (1989) (Congress intends to retain common law immunities existing at the time a statute was enacted in the absence of "specific provisions to the contrary").

II. THE FALSE CLAIMS ACT DOES NOT REFLECT CONGRESSIONAL INTENT TO SUBJECT LOCAL GOVERNMENTAL ENTITIES TO PUNITIVE DAMAGES

Both the original False Claims Act and the 1986 amendments were enacted against the well-established common law rule that local governmental entities are immune from punitive damages. Accordingly, the Court will not conclude that Congress intended to subject local governments to the FCA's penalties absent a clear statement of that intent. In fact, there is no basis for finding congressional intent to subject local governmental entities to the extraordinary risks and burdens of defending suits under the FCA.

A. Congress Did Not Express An Intention To Subject Local Governmental Entities To The FCA In 1863

The False Claims Act was enacted in 1863 "with the principal 'goal of stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 781 (2000) (quoting *United States* v. *Bornstein*, 423 U.S. 303, 309 (1976)) (alteration in *Stevens*). This legislative purpose provides no basis to conclude that local governmental entities were intended as potential defendants.

The text of the statute similarly does not indicate that municipalities were among the FCA's intended targets. The statute applies to any "person" who commits the prohibited acts. 31 U.S.C. § 3729(a). The statute does not define "person," and nothing in the text or legislative history

provides a basis for concluding that Congress intended to include municipalities within that term.[3]

The Seventh Circuit relied exclusively on *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658 (1978), in determining that, in 1863, Congress intended to make municipalities "persons" subject to the FCA. According to the court of appeals, *Monell* establishes that "by 1844, both private and municipal corporations were presumptively included within the meaning of 'person.'" Pet. App. 8a (citing *Monell*, 436 U.S. at 685-689). The court of appeals appears to have misunderstood this Court's decision in *Monell*, however.

In *Monell*, this Court explained that, in 1844, it had determined that *private* corporations should be treated as "persons." See 436 U.S. at 687-688 (citing *Louisville R. Co.* v. *Letson*, 2 How. 497, 558 (1844)). But it was not until 1869 —six years *after* the FCA was enacted—that the Court established that "the *Letson* principle extended * * * to municipal corporations," and that such entities routinely became subject to suit in federal court. *Monell*, 436 U.S. at 688 (citing *Cowles* v. *Mercer County*, 7 Wall. 118, 121 (1869)). *Monell* thus does not support the Seventh Circuit's conclusion that Congress intended to subject municipal corporations to suit under the FCA in 1863.

Indeed, our research yields *no* cases between 1863 and 1986 (when Congress significantly amended the statute) involving suits against local governmental entities under the FCA. This strongly suggests a common understanding that municipalities were not subject to the Act. See also *United States ex rel. Garibaldi* v. *Orleans Parish Sch. Bd.*, 244 F.3d 486, 490 n.4 (5th Cir. 2001) (finding only two cases prior to this Court's decision in *Stevens*—both decided after the 1986

[3] *Amici* wholly agree with petitioner Cook County that an analysis of the structure of the 1863 FCA further demonstrates that local governments were not included as "persons" subject to the Act. See, *e.g.*, Pet. 21-22.

amendments—considering whether municipalities are "persons" within the meaning of the FCA), cert. denied, 122 S. Ct. 808 (2002).

B. Congress Did Not Subject Local Governmental Entities To Punitive Damages In 1986

The 1986 amendments to the FCA fundamentally changed the nature of the Act. Congress greatly enhanced the penalties and damages imposed against violators, and it dramatically expanded the role of private *qui tam* relators as FCA plaintiffs. If Congress had intended to subject local governmental entities to the threat of punitive damages in suits brought by private parties, the presumption against the imposition of punitive damages required a clear statement of its intent to do so. The 1986 amendments, however, contain no indication that Congress possessed such an intent.

1. The 1986 Amendments Completely Transformed The False Claims Act

The 1986 amendments transformed the FCA from a seldom-employed remedial statute into a sledgehammer that gives private relators the financial incentive to pursue even marginal claims. These amendments were more than mere adjustments to the law. They created "a new cause of action, not just an increased likelihood that an existing cause of action will be pursued." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 950 (1997).[4]

[4] Although the amendments radically altered the remedies available under the Act and the incentives for private *qui tam* relators to file suit under the Act, the amendments did not enlarge the scope of "persons" subject to the Act. See *Stevens*, 529 U.S. at 783 n.12 ("the term 'person' has remained in the statute unchanged since 1863").

a. The 1986 Amendments Converted The False Claims Act To A Punitive Statute

The 1986 amendments changed the FCA from a statute designed to compensate the Federal Government to one intended to punish offenders. The FCA's original damages provisions—$2,000 per violation plus double damages (see Act of Mar. 2, 1863, ch. 67, § 3, 12 Stat. 698)—were remedial rather than punitive. See *Stevens*, 529 U.S. at 785 (contrasting earlier remedial model with post-1986 punitive damages); *Bornstein*, 423 U.S. at 314 ("Congress intended the double-damages provision to play an important role in *compensating* the United States") (emphasis added). In 1986, however, Congress increased defendants' potential liability to $10,000 for each false claim. See False Claims Act Amendments of 1986, Pub. L. No. 99-562, §§ 3, 4, 100 Stat. 3154, 3157 (1986). In addition, Congress increased the double-damages provision to treble damages. *Ibid.*; compare 31 U.S.C. § 3730(a) (1982) with 31 U.S.C. § 3729(a) (2000).

This Court has expressly held that "the current version of the FCA imposes damages that are essentially punitive in nature." *Stevens*, 529 U.S. at 784. As the Court explained in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981), "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." Even the court of appeals did not question that the 1986 FCA amendments created a punitive damages regime. See Pet. App. 13a ("damages under the FCA are now considered to be punitive"); see also *Perez* v. *Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 624 (7th Cir. 2000) (Easterbrook, J.) ("Treble damages are a *form* of punitive damages."), cert. denied, 531 U.S. 1153 (2001).

b. The 1986 Amendments Vastly Increased The Frequency Of *Qui Tam* Suits

To encourage the filing of *qui tam* actions, the 1986 amendments also provided substantial new incentives to private relators who sue under the Act. *Schumer*, 520 U.S. at 949. Prior to 1986, no *qui tam* relator could maintain an FCA suit based upon "evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982); see also *Schumer*, 520 U.S. at 945. In addition, the bounties were smaller (between 10% and 25%), and the relator had no right to any minimum recovery. 31 U.S.C. §§ 3730(c)(1), 3730(c)(2) (1982).

After the 1986 amendments, relators can sue even on information already in the hands of the Federal Government. If the United States does not intervene in a lawsuit, relators are guaranteed a bounty of no less than 25%, and up to 30%, of the total recovery. 31 U.S.C. §§ 3730(c), 3730(d) (2000). Even if the United States chooses to intervene, the relator retains a role as a party in the litigation and must receive between 15% and 25% of the proceeds of the suit. *Ibid.* Together with the dramatic increase in the penalties imposed under the Act, these changes greatly enhanced relators' potential recovery and therefore increased their incentive to sue.

c. If Applied To Local Governmental Entities, The 1986 Amendments Would Prove Especially Burdensome

If Congress intended the 1986 amendments to encourage the filing of False Claims Act suits by private relators, it certainly succeeded. In 1987 only 33 relators filed *qui tam* FCA suits; by 1999, the annual total had grown to 481. See JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS, Appendix H, at H-1 (2d ed. 2002). As a result, between 1986 and 2001 *qui tam* relators received a whopping $745 million in bounties under the FCA. *Ibid.*

The reasons for this expansion are obvious. By raising and guaranteeing the relators' percentage recovery, increasing the minimum penalty for every false claim, and adding the punitive treble-damages provision, Congress gave relators an enormous financial incentive to file *qui tam* suits. Relators have responded, cashing in for almost three-quarters of a billion dollars since the enactment of the amendments. With a False Claims Act plaintiff's bar now well-established and soliciting business, and with the Federal Government's spending continuing to grow, the number of *qui tam* suits filed in the future cannot be expected to diminish.

As this Court has previously noted, moreover, "a relator's interests and the [Federal] Government's do not necessarily coincide." *Schumer*, 520 U.S. at 949 n.5. FCA litigation conducted by the United States is grounded in the pursuit of the public good, and tempered by ongoing attention to ensuring that the suit remains in the federal interest. See U.S. ATTORNEY'S MANUAL, § 9-27.220-230. By contrast, *qui tam* relators "are motivated primarily by prospects of monetary reward rather than the public good." *Schumer*, 520 U.S. at 949. As this Court has recognized, *qui tam* relators are simply "private persons acting * * * under the strong stimulus of personal ill will or the hope of gain." *Schumer*, 520 U.S. at 949 (quoting *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541 n.5 (1943)).

The differing interests of the United States and private relators would have significant consequences if local governments were subject to suit under the FCA. Given the important interests of federalism and comity, the United States owes local governmental entities its careful consideration before it pursues *any* litigation against them.[5] It

[5] This point was made forcefully by Judge Weinstein in his dissenting opinion (subsequently vindicated by this Court) from the Second Circuit's decision in *Stevens*: "Entrusting the United States' decision to sue a state to a *qui tam* relator, with an incentive to sue even when the merits of the suit are questionable, and even though its prosecution harms the interests of the federal government, the state and the ongoing relationship between the two sovereigns, effectively short circuits the moderating processes afforded congresspersons and state and federal administrators." *United States ex rel. Stevens* v. *Vermont Agency of Natural Res.*, 162 F.3d 195, 225 (2d Cir. 1998), rev'd, 529 U.S. 765 (2000). Although Judge Weinstein's analysis concerned the effect of *qui tam* suits upon States, he expressly noted that the congressional communication disrupted by the FCA "is often, most importantly, conducted on behalf of state *and municipal governments and their officials*." *Id.* at 226 (emphasis added); see generally *id.* at 225-229.

must consider whether the overall benefits of bringing suit justify the often astronomical litigation expenses that the municipality must bear in defending against such suits, not to mention the risk that its citizens will suffer through decreased services or that taxpayers will be forced to pay higher taxes. Those interests are only compounded when the litigation in question will result in punitive damages. Local governmental entities therefore deserve—and presumably would receive if they were subject to FCA suits—the fully informed judgment and discretion of professional prosecutors.

The rational *qui tam* relator, however, would ignore many of the factors that the Federal Government would consider in deciding whether to pursue litigation against a municipality. The relator would not face the political restraints that would rein in the Federal Government's litigation against a local government. The relator, who may not even reside in the community subject to the suit, might not be concerned about the impact her suit would have on the community or its citizens. These factors would reduce the chances of reaching an early resolution, and would increase the likelihood of expensive and protracted litigation.

The severity of the FCA's regime of punitive damages and the jeopardy to which it would expose local governments provide compelling reasons for this Court to require an

exceptionally clear statement from Congress that it intended to subject governmental entities to this "new cause of action" and all of its attendant burdens and dangers. *Schumer*, 520 U.S. at 950. As we next show, however, the 1986 FCA amendments contain not even the slightest hint that Congress intended to subject local governmental entities to punitive liability.

2. The 1986 Amendments Contain No Clear Statement Of Intent To Strip Local Governmental Entities Of Their Immunity From Punitive Damages

Because the 1986 amendments created a "new cause of action" implementing a punitive damages scheme (*Schumer*, 520 U.S. at 950), Congress understood that it was required to provide a clear and unambiguous statement in the statute if it intended to subject local governmental entities to punitive damages under the FCA. The 1986 amendments contain no such clear statement. See Pub. L. No. 99-562, 100 Stat. 3153.

The proper analysis in this case closely tracks the analysis employed by this Court in *Stevens*. In *Stevens*, the Court evaluated whether States were subject to suit under the False Claims Act. In determining whether States were "person[s]" within the meaning of that term as used by Congress in 1863, the Court applied the "longstanding interpretive presumption that 'person' does not include the sovereign." *Stevens*, 529 U.S. at 780. After reviewing the text of the FCA, the Court concluded that "the text of the original statute does less than nothing to overcome the presumption that States are *not* covered." *Id.* at 782. With no textual evidence to rebut the presumption, the Court held that States were not proper defendants under the FCA. See *id.* at 787-788.

The same logic controls here. In this case, the Court begins with the presumption, established in *City of Newport*, that local governmental entities are not subject to punitive

damages. Like the presumption that States are not "persons," the presumption of municipal immunity from punitive damages "is, of course, not a 'hard and fast rule of exclusion.'" *Stevens*, 529 U.S. at 781 (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604-605 (1941)). But, also like the presumption that States are not "persons," the presumption of municipal immunity from punitive damages "may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Ibid.* In this case there is no clear statement of statutory intent to subject local governments to punitive damages, either in the 1863 enactment or in the 1986 amendments. As in *Stevens*, then, the FCA "does less than nothing to overcome the presumption." 529 U.S. at 782.

Indeed, *Stevens* provides additional grounds for upholding municipal immunity from the punitive damages imposed under the FCA. In support of its holding that States were not subject to suit under the FCA, the Court noted that the punitive damages made available by the 1986 amendments to the FCA "would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." *Stevens*, 529 U.S. at 784-785 (citing *City of Newport*, 453 U.S. at 262-263). Obviously, the Court did not find in the 1986 amendments any statement of congressional intent to abrogate governmental immunity from punitive damages. *Stevens* thus compels reversal of the judgment below.

The Seventh Circuit did not purport to find any clear statement of congressional intent to subject local governmental entities to punitive damages in the 1986 amendments. Instead, the court of appeals inverted the correct analysis. Proceeding on its mistaken understanding (Pet. App. 8a) that municipalities were presumptively "persons" at the time the original FCA was enacted in 1863 (which we refute at pages 9-11, *supra*), the court performed a

cursory search for a clear statement that municipalities had been *exempted* from the more onerous sanctions that Congress enacted in 1986. See, *e.g.*, Pet. App. 17a ("In enacting the 1986 changes to the statute, * * * Congress did not indicate in any way that it intended to exempt municipal entities from the scope of the statute."). Even if municipalities *had* been subject to the original Act's remedial sanctions, a clear and affirmative statement of intent to impose the new punitive regime on municipalities would have been necessary. Because municipalities were *not* clearly subject even to the 1863 Act, however, the Seventh Circuit's inference from congressional silence of the intention to impose *punitive* damages under the beefed-up Act was wholly unreasonable.

It is a sign of the superficiality of the Seventh Circuit's analysis that it purported (Pet. App. 10a) to find vindication of its conclusion in a snippet of the legislative history of the FCA amendments. The court of appeals cited a 1986 Senate Report defining "person" to include "all parties who may submit false claims * * * [including] States and political subdivisions thereof." S. Rep. No. 99-345, at 8 (1986), reprinted in 1986 U.S.C.C.A.N. 5266.

Of course, this Court had previously dismissed that exact passage as "setting forth a Senate Committee's (erroneous) understanding of the meaning of the statutory term enacted some 123 years earlier." *Stevens*, 529 U.S. at 783 n.12. Undaunted by this Court's analysis, the Seventh Circuit proceeded to place near-controlling emphasis on that sentence in the Senate Report, based on its subjective confidence that it understood all of the reasons why the sentence was "erroneous." Pet. App. 10a-11a n.8. But the court missed the point of this Court's warning—the views of a Senate Committee 123 years following the enactment of a statute provide poor insight into the intent of the Congress more than a century before.

This Court explained in *Stevens* that legislative history alone "would be unequal to the task" of providing a sufficiently clear statement of intent to override a presumption. 529 U.S. at 783 n.12. In fact, the legislative history of the 1986 amendments supports the conclusion that Congress understood municipalities to retain their common law immunity from punitive damages. The Congressional Budget Office's report of the cost estimate of the False Claims Amendment Act stated that "[t]hese amendments are expected to involve no significant costs to * * * state or local governments." S. Rep. No. 99-345, at 37 (1986), reprinted in 1986 U.S.C.C.A.N. 5266. Certainly, the higher damages available under the Act, as well as the increased risk of lawsuits under the 1986 amendments, would represent a "significant cost[]" to any entity subject to the FCA. *Ibid.* That no such cost was anticipated for municipalities weighs against a finding that Congress intended to abrogate their immunity from punitive damages under the FCA.

At the end of the day, the 1986 FCA amendments simply do not contain any clear statement that Congress intended to displace the traditional common law immunity and subject local governmental entities to punitive damages under the FCA. Significantly, even the court below did not purport to find a sufficiently clear statement in the FCA of congressional intent to displace immunity. Instead, it subjected Cook County to the FCA's punitive damage scheme only by inverting the proper analytical framework and placing the burden on Cook County to produce textual statutory evidence that it was immune.

Under the correct analysis—one similar to that conducted by this Court in *City of Newport* and *Stevens*—it is clear that neither the original 1863 FCA nor the 1986 FCA amendments contain a clear statement by Congress that local governmental entities are to be stripped of their common law immunity and subjected to the FCA punitive damages regime. This Court

should therefore reverse the judgment of the Seventh Circuit and hold that local governmental entities are immune from suits brought under the False Claims Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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